83-745

NO. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JULIAN I. RICHARDS, an individual,
Petitioner,

vs.

HOWARD UNIVERSITY, a District of Columbia corporation
and
PATRICIA P. HAMILTON, Personal Representative of the Estate of John L. Hamilton, deceased, the former Ancillary Administrator, d.b.n., c.t.a. of the Estate of Edith A. Parsons,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Pro Se

QUESTION PRESENTED

Did the United States Court of Appeals for the District of Columbia Circuit commit reversible error in affirming the District Court's imposition of the common law doctrine of Res Judicata as a bar to the litigation of petitioner's complaint seeking removal of a cloud on, and a quieting of, his title to D.C. real property devised by the Will of his aunt, Edith A. Parsons, and by so doing violate petitioner's constitutional right to due process of law with a resultant fifth amendment deprivation of property?

The parties to the proceeding in the court whose judgment is sought to be reviewed were:

(1) Howard University
c/o James E. Cheek, President
2400 6th Street, N.W.
Washington, D.C. 20059

(2) Patricia P. Hamilton, Personal Representative of the Estate of John L. Hamilton, Deceased, the former ancillary administrator, d.b.n. c.t.a. of the Estate of Edith A. Parsons
c/o James C. Gregg, Attorney at Law
1625 K Street, N.W.
Washington, D.C. 20006

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITY

PAGE

PAGE

PAGE

OPINION BELOW

The United States Court of Appeals for the District of Columbia case petitioner asks be reviewed is:

No. 82-2317, (unreported), an appeal from the order of the U. S. District Court for the District of Columbia in 82-1854, a civil action for violation of constitutional rights and to remove a cloud and quiet title to real property, dismissing, with memorandum opinion, the complaint on defendants Motion For Summary dismissal on grounds of Res Judicata. The Court of Appeals granted the Appellee's Motion for Summary Affirmance of the District Court's dismissal, also on Res Judicata grounds.

Petitioner, Julian I. Richards, prays that this honorable court in the exercise of sound judicial discretion will recognize the important need for an ever increasingly efficient, fair and orderly administration of justice in the fields of law traversed by the participants in the administration of the estate of Edith A. Parsons and issue the Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Its diversity jurisdiction continues to require that it be very much as it has always been, a local court of the District of Columbia.

JURISDICTION

Jurisdiction of this Court to review by Writ of Certiorari the judgment of the United States Court of Appeals for the District of Columbia Circuit dated and entered on March 28, 1983 in No. 82-2317, summarily affirming on Res Judicata grounds the dismissal with prejudice in the Court of instance also on Res Judicata grounds of your petitioners diversity action to remove cloud and quiet title to real property and for damages for violation of constitutional rights is believed to be conferred, under Article III, Section 2 of the Constitution, by the authority of Title 28 U.S.C. 1254(1) wherein it is stated, verbatim that:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

This petition is timely filed because the order denying the petition for rehearing of the summary affirmance Judgment of March 28, 1983 was made and entered on June 9, 1983 and petitioner obtained an extension of time to petition for a Writ of Certiorari to and including November 6, 1983 which was signed by Justice Brennan on September 6, 1983.

FINALITY

Petitioner respectfully submits that the Judgment Order asked to be reviewed meets the finality requirements, called for by this courts holding in *Market Street Railway Company v. Railroad Com. of California*, 324 U.S. 548, 89 L. Ed. 1171 at

1176, that "Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

STANDING

Petitioner respectfully submits that he has met the standing requirements of Warth v. Seldin, 422 U.S. 490, having alleged in his complaint in 82-2317 in the U. S. District Court for D.C.". . .such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the courts remedial powers on his behalf." As said in Warth, your petitioner ". . .has suffered 'some threatened or actual injury resulting from the putatively illegal action'. . .*Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 35 L. Ed. 2d 536, 93 S. Ct. 1146 (1973). See *Data Processing Service v. Camp*, 397 U.S. 150, 151-154, 25 L. Ed. 2d. 184, 90 S. Ct. 827 (1970).[10]"

FN10 The standing question thus bears close affinity to questions of ripeness–whether the harm asserted has matured sufficiently to warrant judicial intervention and of mootness–whether the occasion for judicial intervention persists. E.G. *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972); *Hall v. Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969). See *AntiFacist Committee v. McGrath*, 341 U.S. 123, 154-156, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurther, J., concurring)."

Petitioner was devised a fee simple title and his standing as title holder continues to be ignored by Howard University and, therefore, the deed that Howard holds persists as a cloud on petitioner's title and is effectively depriving him of the property that vested title represents. That harm has matured sufficiently to warrant judicial intervention because the deed

continues to exist of record and petitioner, by pursuit of his two civil actions to remove the cloud of the deed on his title, has exhausted his remedies in the lower courts of the District of Columbia and was ignored in his efforts to obtain aid in the District of Columbia proceedings from his successor personal representative in the Maryland domiciliary proceeding, the Suburban Trust Company.

SUBSTANTIAL FEDERAL QUESTION

Petitioner's complaint in CA 82-2317 in U. S. District Court (D.C.) alleged he had been damaged by a deprivation of his property, an unconstitutional taking without due process of law. He first raised the question of his constitutional rights in the District of Columbia ancillary proceeding at a hearing, held, on December 6, 1973, to require him to show cause why he, inter alia, should not be required to execute a deed to complete the judicial sale. (See appendix A-159.)

The violations of your petitioner's fifth amendment rights, including the failure of notice with resultant failure of meaningful opportunity to be heard and exert influence, both inside and outside of the legal proceedings, to which his status entitled him are issues framed with fair precision by petitioner he is confident it will be found from the record as a whole. As this court said in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, speaking of "fair precision", ". . . if the record as a whole shows either expressly or by fair intendment that this was done, the claim is to be regarded as having been adequately presented."

Your petitioner it is respectfully submitted both expressly and by clear intendment framed the constitutional issues which

were with one exception in a Maryland proceeding either overlooked, avoided or evaded by the authorities responsible for respecting their possible presence and coming to grips with them. Surely the record will clearly aid this court in concluding that petitioner more than met the burden of framing the question with the particularity required – he framed the constitutional issues time and time again by ". . . averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right. Axley Stave Co. v. Butler County, 166 U.S. 648, 655."

In Feldman v. Gardner, 661 F.2d at 1310 the United States Court of Appeals for the District of Columbia Circuit said, "But whether, for purposes of ascertaining the jusidiction of a federal court, a particular proceeding before another tribunal was truly judicial is a question of federal law calling for close inspection of its features", citing In Re Summers, 325 US 561, 566, 65 S. Ct. 1307, 1310-1311, 89 L. Ed. 1795, 1800 (1945) and cases cited there.

Petitioner respectfully submits this substantial federal question pointing out the difficult procedural problem of how to distinguish an ajudication in an otherwise non-judicial proceeding and bearing as it does with a depriving impact on your petitioner's right to due process and the peaceful, unclouded possession of his property is, per se, an important enough reason for this court to exercise its jurisdiction and elaborate and refine its holding in Prentis v. Atlantic Coast Line Co., 211 US 210. (See Argument herein.)

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article XIV, Section One of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article V, Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

* * * * *

DISTRICT OF COLUMBIA CODE
(Volume One – 73 Ed.)

Title11 – Organization and Jurisdiction of the Courts
Subchapter II – Jurisdiction

Section 11-721. Orders and judgments of the Superior Court

(a) The District of Columbia Court of Appeals has jurisdiction of appeals from–

(1) all final orders and judgments of the Superior Court of the District of Columbia;

(2) interlocutory orders of the Superior Court of the District of Columbia–

(A) granting, continuing, modifying, refusing, or dissolving or refusing to dissolve or modify injunctions;

(B) appointing receivers, guardians, or conservators or refusing to wind up receiverships, guardianships, or the administration of conservators ot to take steps to accomplish the purpose thereof; or

(C) changing or affecting the possession of property; and

(3) orders or rulings of the Superior Court of the District of Columbia appealed by the United States or the District of Columbia pursuant to section 23-104 or 23-111(d)(2).

(b) Except as provided in subsection (c) of this section, a party aggrieved by an order or judgment specified in subsection (a) of this section, may appeal therefrom as of right to the District of Columbia Court of Appeals.

(c) Review of . . .

(d) When a . . .

(e) On the hearing of any appeal in any case, the District of Columbia Court of Appeals shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (July 29, 1970, Pub. L. 91-358, Section 111, title I, 84 Stat. 480.)

STATEMENT OF THE CASE

During the conservatorship portion of the administration of his Aunt Edith A. Parsons estate in the District of Columbia, petitioner Julian I. Richards was an heir, the Executor-designate and one of the three principal beneficiaries under her will – an interested person. Upon her death, he became by devise holder of a 1/6th fee simple title to her real estate, the estate Executor, and a residuary legatee of personalty in her estate. From the inception of the conservatorship, which he initiated, petitioner was confronted with controversy and opposition, removal as fiduciary, and subjected to an attempt to divest him of the aforementioned fee simple title. His legal status, rather than helping him carry out the intended disposition of his Aunt's property, caused him to be ignored, harassed, deceived and, deprived of his property without due process of law it is, and always has been, his sincere and unwavering conviction.

Without seeking redress outside of the estate administration per se by a civil action in a court of general jurisdiction, petitioner twice sought redress in this court. Questioning the maladministration of the estate itself, first, in 74-1501, he attempted to draw in question sections of the D. C. Code but probably because of the *Palmore* decision, 411 U.S. 389, 36 L. Ed.2d 342, it was dismissed as an appeal for want of jurisdiction and treated as a Writ of Certiorari and denied. 74-1501 was an attempt to obtain a review of the Conservatorship as a separate proceeding while all three administrations of the decedent's estate were on-going. The second, 75-1573, was a petition for a Writ of Certiorari asking for a review of the entire D. C. ancillary administration including the Conservatorship. The Maryland and Virginia administrations were on-going at the time. It was denied.

Following his final appeal in the State of Maryland in Petition Docket No. 288, September Term 1978, the Court of Appeals of Maryland by Judgment Order, dated September 22, 1978, denied his Petition for Writ of Certiorari (unreported) and petitioner again sought redress in this Court. In Maryland, he had sought to compel entry into the District of Columbia Courts of his successor as estate Executor, the Suburban Trust Company, to pursue his interests as a beneficiary under his Aunts will but to no avail. Therefore, his third approach to this honorable court sought, in one petition, writs to both the Maryland Court of Appeals and the D. C. Court of Appeals and the Clerk refused to docket it and its separate appendix in October Term 1978.

From late spring 1979 when he accepted the fact that the Clerk's Office would not docket his one petition seeking the writs to different jurisdictions, petitioner consumed almost three years trying to obtain counsel, trying to work with obtained counsel in deciding where and how to seek a remedy and, finally, his counsel, deciding he could not render the expertise required, in reaching his own decision on what to do.

On July 1, 1982, your petitioner filed, as simultaneously as he could, two civil actions to Quiet Title to Real Property; first, No. 82-1854 in the United States District Court for the District of Columbia, and then, minutes later, CA 8771-82 in the Superior Court for the District of Columbia. He did this out of fear that diversity action 82-1854 involving local real property might be held to be no longer within the jurisdiction of the United States District Court for the District of Columbia, *or*, that in CA 8771-82, he be barred from prosecution by Res Judicata. He acted on information from the D. C. Register of Wills office that his right to pursue a claim against the estate of the late John Hamilton would expire unless a civil lawsuit were begun by early July 1982.

Up until those two civil action filings, everything involving his 1/6th fee simple estate in the subject real property that had taken place in the courts of the District of Columbia following the ending, on February 19, 1973, by the ward's death on that date of the power and authority of the conservator in D. C. Superior Court civil action 1600-71, (a conservatorship of property). In Re *Beier*, 48 NJ Super. 450, 137 A 2d 617 (1958), including the execution and recordation of the deed being complained of, took place within the framework of a decedent's estate administration.

Because he contends that the wards death ended the conservatorship before an effective confirmation order could be entered; and because of his contention that the deed as an action within the framework of a decedent estate was void; and because the entire D. C. estate administration (conservatorship and decedent's estate) contained only one ajudication giving rise to an ineffective decree thereon, and because of this court's declaration in Ferris v. Higley, 20 Wallace (US) 375 (1874) that the rules of the Common Law (including the common doctrine of Res Judicata?) do not apply in orphans court proceedings, Petitioner contends that the United States Court of Appeals for the District of Columbia Circuit committed reversible error in upholding the District Court's imposition of Res Judicata as a bar to petitioner's complaint for violation of his constitutional rights and to remove a cloud and quiet title in his civil action 82-1854.

(Please refer to the Statement of the Case in companion petition, No. 159, for Writ of Certiorari to the District of Columbia Court of Appeals)

ARGUMENT

It will be shown that it was reversible error for the U. S. Court of Appeals for D.C. to affirm the Districts court invocation of Res Judicata to bar petitioner's suit. In affirming, it cited only its own cases (See appendix p. A-2); no local D.C. court cases and no cases from Maryland where the domiciliary administration of the subject matter estate took place. Would it be a constructive innovation in the law to require use of the Res Judicata laws of the domicile state in litigation arising out of claims in, or arising from, an ancillary estate administration?

In Durfee v. Duke, 375 US 106, this court said:

"However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Were the questions of jurisdiction fully and fairly litigated in the Parsons' estate administration and in the civil actions to quiet title?

One might think that they were from a reading of Judge Green's memorandum opinion in CA 82-1854 but careful analysis of the record reveals that the entire Parsons' estate administration, conservatorships in D.C. and Virginia, and de-

cedent's estate administration in Maryland, Virginia and D.C. contains no ajudicative declaration on, much less a full and fair litigation of, the issue of the D.C. Superior Courts jurisdiction to consider the sales contract of realty as presented and its jurisdiction to hold hearings and make orders while the proceeding was on appeal to another court. Only a passing reference to jurisdiction was made by the D.C. Court of Appeals in its case 7831 opinion. It said, "The trial judge sought memoranda respecting the appealability of the order, no doubt questioning the trial court's continued jurisdiction if this court had acquired jurisdiction." Petitioner respectfully submits that for this reason alone, and others, Res Judicata application should be held to have been egregious error requiring reversal within the rulings of Pernell v. Southall Realty, 416 US 363.

The United States Court of Appeals for the District of Columbia Circuit very succinctly, clearly and completely stated the effect of a proper application of Res Judicata as a bar, in Semler v. Psychiatric Inst. of Wash., 188 U.S. App. D.C. 41, where it is said:

> Under the doctrine, once a claim or Cause of Action has been presented for adjudication and a valid and final judgment on the merits has been rendered, the same claim or cause of action cannot be asserted in a subsequent suit.

In the District of Columbia administration of the Edith A. Parsons estate there was no invocation of the plenary proceeding provisions of the D.C. Code; no adjudication setting all claims to rest took place; no decisions, much less adjudications, were made on the merits, except with regard to the dignity of a judicial sale confirmation order, per se; no adjudications with regard to jurisdiction were made and the bare bones image of the relevant orders casts doubt on their quality and extensiveness, Montana v. United States, 440 U.S. 147. More importantly

is that there having been no previous suit by plaintiff, the case when on appeal to the U. S. Court of Appeals for the D.C. Circuit should not have been found to be a "subsequent suit" within the meaning of Semler, it is respectfully submitted. Petitioner had done nothing more than seek a proper administration of his aunt's estate up until he filed the two civil actions in July, 1982.

He had taken part in an administrative proceeding, albeit one in which judicial determinations and adjudications can be made, not in a lawsuit aggressively pursuing a "claim" or "cause of action" contemplated by the doctrine to be vexations if allowed to be repeated after having once been adjudicated by a competent authority.

Petitioner did not find a reported case of this court or of either of the D.C. Courts of Appeal on Res Judicata grounds on all fours with the situation his case presents. In the entire D.C. ancillary administration, it was only in Case 7831, reported in 328 A.2d 383, that an issue, one issue, was distinctly raised and extensively enough considered to justify its preclusion from relitigation. It was decided, on the erroneous assumption that a sound jurisdictional basis existed, that a valid confirmation order was outstanding and that ". . .the parties are committed to complete the transaction." However, under the circumstances, the party-seller being the court and the ward having died, the court was prevented from valid performance, although it attempted nevertheless, by loss of control over the subject matter of the contract and failed to regain that control by a due process procedure to divest the title from the ward's devisees. Plaintiff respectfully opines that in 7831 the decreed preclusion could very well have been more properly and accurately described as an estoppel. The court said, "Out prior order of dismissal made final the order of confirmation, and Richards is

barred by the doctrine of res judicata from further litigating *his objection to that sale.*" (Emphasis added)

It was an erroneous assumption in 328 A.2d 383 that the Superior Court had jurisdiction to make the confirmation order initially. The court said:

> Richards noted an appeal from that order (No. 7128). The trial judge sought memoranda respecting the appealability of the order, no doubt questioning the trial court's continued jurisdiction if this court had acquired jurisdiction. Only the conservator responded, contending that the order was not final and therefore not appealable, with which the trial court agreed. We also *think* that the order was not appealable since it was not final, but simply an order authorizing negotiations for a private sale. Judicial control remained to determine regularity of the anticipated sale and confirmation of the sale when a buyer could be found. (Emphasis added)

Noting above that the court said it "thinks" the judicial sale order was appealable, it doesn't sound much like an adjudication; and plaintiff respectfully submits that there is a reasonable doubt that the appealability issue was adjudicated extensively enough to prevent relitigation, if it was adjudicated at all. In Montana v. United States, 440 U.S. 147, in headnote 8A it is said:

> The redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedure followed in prior litigation.

And, in McNellis v. First Federal Savings and Loan Assn. of Rochester, N.Y., 366 F.2d 257 (1966), the 2nd Circuit said:

> Finally, although the principles of Res Judicata should not be frugally applied, . . . , a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue.

Also, in 328 A.2d 383 no reference is made to the deed which had already been recorded, or, to the other pending appeals questioning the order authorizing the execution of the deed, and therefore reason enough is presented to doubt the quality and extensiveness of that decision as a basis for merger and bar. Indeed there is reason to doubt what really crucial substantive ultimate question of law or fact was decided. In fact, none were.

Speaking of the doctrine of collateral estoppel this Court said in Yates v. United States, 354 U.S. 298:

> That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. Commissioner v. Sunnen, 333 US 591, 601, 92 L ed 898, 907, 908, 68 S Ct 715; . . .

Plaintiff respectfully submits that in its role as a super orphans court, the D.C. Court of Appeals in its 783! decision made conclusive no fact or question of law essential either to its "estate settling" purpose or to petitioners.

How can any decision dealing with the title to real estate where a will and a deed are involved be held to be one "on the merits" when neither the will or the deed is even so much as alluded to in the decision? Black's Law Dictionary 5th Ed. tells us that "The word 'merit' as a legal term is to be regarded as referring to the strict legal rights of the parties, Mink v. Keim, 266, App. Div. 184, 41 N.Y. s.2d 769." No such adjudication on the merits has taken place thus far in any case relating to

the estate of Edith A. Parsons (See Lawlor v. National Screen Service Corp., 349 U.S. 322).

There should be little doubt that the D.C. Court of Appeals decision in 328 A.2d 383, upholding the dignity of confirmation orders in judicial sales, was not a judgment final enough to be the basis for a preclusion of further litigation. It simply had not ended the controversy. Many related appeals were still pending when it was made. As enunciated by our D.C. United States District Court in a headnote in Mazaleski v. Harris, 481 F. Supp. 696 (1979):

> 2. Judgment 650
> A judgment is final regarding cause of action for res judicata purposes only if that action could not become affected by further proceedings in the court where the judgment was rendered.

Clearly the decision on 328 A.2d 383 doesn't meet that criterion, a fortiori; it did not arise out of a civil suit on a specified cause of action. No plenary proceeding provisions of the code having been invoked during the Parsons estate administration, and because of Ferris v. Higley 87 U.S. 375, the general jurisdictional powers of the court had no effect on the actions of either the Superior Court or the Appeals Court; and, therefore, no adjudication can be found to have taken place, as required for Res Judicata invocation. This is true absent a clear expression by the court with regard to its general powers, as to the claims of all parties, and, an expression by the court purporting to set those claims at rest. (See Emmco Insurance Co. v. Brown, 178 A.2d 429, D.C. App.) The record reveals no such expression.

When one studies Costello v. United States, 365 U.S. 265, and keeps in mind that plaintiff distinctly put the issue of the

jurisdiction of the Superior Court to continue conducting the judicial sale before the D.C. Court of Appeals, it becomes difficult to conclude that that court was right in upholding the Confirmation Order at all. It appears to plaintiff that his failure to prosecute his appeal (No. 7225) from the initial judicial sale order, would not be, under the holding in Costello, a dismissal on the merits provided for in F.R.C.P. 41 but should have been held to be an exception and therefore clearly not a proper basis for merger and bar under Res Judicata.

This honorable Court should direct particular attention to two other case orders which followed. One, of course, is the order in No. 8406 an appeal from the order of the Superior Court Probate Division, dated May 7, 1974, authorizing and directing Ancillary Administrator d.b.n., c.t.a. John Hamilton to execute the deed (See appendix A-159). That order called for "...conveyance of the interest of decedent..." which interest was already vested in plaintiff and his two sisters. The D.C. Court of Appeals dismissed the appeal (8406) from that order without holding a hearing, on December 20, 1974, following its November 13, 1974 decision in 7831, 328 A.2d 383.

The other order (See appendix A-159) referred to is the last order in the D.C. estate administration, dismissing the appeal No. 9672 from the Superior Court order approving the auditor's report and the first and final account of the ancillary administrator John Hamilton. That order, labeled "Judgment," dated January 26, 1976, in substance says "that there exists no error of law which requires reversal."

That order is the only one which, by any stretch of the imagination could be a basis for res judicata invocation, and in that consideration the Costello case is pertinent. The exten-

siveness of that dismissal order fails to meet the standard called for in Montana also, but the fact that it doesn't reflect that any "right between the parties" has been adjudicated makes it an improper basis for res judicata as Costello makes clear. As said in Costello:

> . . . In Haldeman v. United States, 91 US 584, 585, 586, 23 L ed 433, 434, which concerned a voluntary nonsuit, this Court said, 'there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. (Emphasis added)

Petitioner respectfully submits that those three orders, 7831 labeled an "opinion," 8406 – an order of Dismissal, and 9672 labeled "Judgment," each entered on a different date, even when considered together, do very little more than distinctly and explicitly adjudicate the issue of the viability of the confirmation order, per se; and therefore are patently reflective of a lack of quality and extensiveness as called for by the doctrine of Res Judicata (See Montana v. United States, 440 U.S. 147), especially when the number of issues plaintiff raised in his three briefs and his petition for rehearing are taken into account and it is remembered that no hearing was held in Appeal 8406.

The final order in 9672 was entered on January 29, 1976. During 1975, your plaintiff, a resident of Virginia Beach, Virginia, had his hands full with the administration of the estate in Maryland and in preparation of an appeal to this honorable Court from the completed conservatorship proceeding. He frankly was convinced at that time that any further effort in the courts of the District of Columbia would be like

trying to tackle Redskin John Riggins and that perhaps he could better serve himself, his relatives and the public by coming to this court. His expectations have yet to be realized.

Petitioner respectfully suggests that a review of his Memorandum of Points and Authorities in opposition to the defendant's Motion to Dismiss, in CA 82-1854 U.S.D.C. for D.C. may be helpful at this point.

The only justification for the way the Parsons estate was administered is the authority and tradition gathered and inferred from Ferris v. Higley, 87 U.S. 275 (1874), in which this court tells us in reference to orphans courts that:

> Such courts are not in their mode or proceeding governed by the rules of the common law. They are without juries and have no special system of pleading.

Petitioner submits that the Court Reform Act of 1970 and Andrade v. Jackson, 401 A.2d 990, by the D.C. Court of Appeals, did not legislate away the basic nature of an estate administration and that unless plenary proceedings are insisted upon the traditional ways will continue even though they will be taking place in a court of general jurisdiction. *However*, the important point in this is that, Res Judicata, a common law doctrine, cannot be applied to a decedent's estate administration if Ferris v. Higley is still the law in the District of Columbia, as it seems to be from Petitioner's experience with the Parsons estate, unless and until a plenary proceeding under Code Sections 18-512 or 16-3105 is contained distinctly within the larger proceeding replete with common law rules and due process requirements. Such was not the case in the administration of the estate of Edith A. Parsons however, and therefore Res Judicata should be held to be inapplicable to it, even

though it was closed only after a review by the D.C. Court of Appeals in case No. 9672. It should be so held because in deciding 9672 the court was acting only as a supervisory orphans court and did not adjudicate a substantive issue; doing little more than providing the bonding companies with some protective insulation. After all is said and done, the simple definition in Blacks Law Dictionary 5th Edition says that adjudication "...implies a hearing on the factual issues involved"; and, "contemplates that the claims of all parties thereto have been considered and set at rest." It is certainly abundantly clear that of the three D.C Court of Appeals estate administration orders only the 7831 opinion contains an adjudication, and, taken together the three do not measure up to the quality of extensiveness called for by this Court in Montana v. United States, 440 U.S. 147 it is respectfully submitted.

The second paragraph of Judge June Green's memorandum opinion implies that your petitioner slept on a possible remedy. Beginning with the second paragraph on page 9 of his U. S. District Court Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, petitioner explains what happened relative to the May 7, 1974 order approving the conveyance. It was in early March 1974 that petitioner accompanied by his attorney went to Hamilton's office for a discussion. Hamilton had indicated a willingness in the telephone conversation setting up the appointment to help petitioner arrange a loan to pay the estate taxes, but early in the very short discussion became unwilling to be cooperative with petitioner, the Executor of the estate, upon learning that petitioner had no intention of going along with the sale of his real estate. Petitioner feels very strongly that the mere threat Hamilton's petition as received seemed to him to be was not the kind of notice required by due process. As Justice Douglas said in Bank of Marin v. John M. England, 385 U.S. 99 (1966),

"The kind of notice required is one 'reasonably calculated, *under all the circumstances,* to apprise the interested parties of the pendency of the action'." (Emphasis added)

Petitioner respectfully submits that he did not receive that kind of notice; *and* he received no notice of the signing of the order – he was sent a signed copy in the mail. In Franklin v. Chas. C. Schulman Co., Inc., 31 A.2d 871 (1942), the District of Columbia Municipal Court of Appeals held that "No step in the course of a legal controversy should be taken without notice to the opposing party." Petitioner opines adamantly that the Register of Wills, or the Clerk of one of the two courts should have warned him that an arbitrary action would take place unless he took action to prevent it. As it was and as pointed out in the Memo in 82-1854 upon receipt of the order, petitioner reacted as promptly as possible. It should also be kept in mind that during the time span referred to by Judge Green in paragraph two of her opinion, petitioner's Appeal 7831 was pending and petitioner was expecting a favorable decision. He did not sleep on rights or select the wrong remedy. He was aware of the plenary proceeding provisions of 18-512 and 16-3105 which he construed to be applicable only in the probate court and perhaps rendered obsolete by the Court Reform Act of 1970, but since CA 1600-71, the conservatorship, was, he thought, a civil action in the civil division of a court of general jurisdiction, and, because with regard to the May 7, 1974 order authorizing the execution of the deed he was expecting a favorable decision from the D.C. Court of Appeals, use of the plenary sections appeared redundant and unnecessary.

In 328 A.2d 383 Petitioner appealed from the final order closing the conservatorship, reasoning that he could raise in that appeal all issues which arose therein and remained unadju-

dicated. To say he was somewhat surprised at invocation of Res Judicata based on the finality of the confirmation order after his aunt's death is to put it mildly indeed. See In Re: Beier, 48 N.J. Super. 450, 137 A.2d 617 (1958). The conservator himself, John Powell, must have been surprised inasmuch as he had earlier written the Appeals Court Clerk stating that he considered that the ward's death mooted all the controversy over the sale and that he, therefore, saw no need to file a brief. (See appendix A-159.)

Invocation of res judicata in support of the judicial sale was not in accord with this court's holding in Hoffman v. Blaski, 363 U.S. 335, 4 L. Ed. 2d 1254, 80 S. Ct. 1084 wherein the principles of res judicata were found not applicable to an order because of its interlocutory nature and because the judgment was not upon the merits. If a judicial sale is a contract carried out under process of the court, then, in a conservatorship proceeding the possibility that the ward's death will terminate the sale as to an heir or devisee who has not consented to it negates the final character of an order of confirmation rendered over the non-consenting heir's objection. This possible effect of a ward's death or of the removal of his disability, if held to be the law of the District of Columbia, could be held to render as interlocutory *any* judicial sale confirmation order until an appeal from the truly final order in the proceeding – the order approving the final accounting and the Auditor-Master's report have been ruled upon. As the Municipal Court of Appeals for the District of Columbia said, in Weiss v. Young, 64 A.2d 310 (1949):

> It is plain the judgment did not decide all issues between all parties. The main action remains pending and unheard. *The federal rule has long been that a case 'is not to be sent up in fragments.' Catlin v. United States,* 324 U.S. 229, 234, 65 S. Ct. 631, 89 L. Ed. 911. (Emphasis added)

The possible lack of jurisdiction for the judicial sale was recognized by the D.C. Court of Appeals in its 7831 decision, but the mistake regarding the appealability of the order authorizing the sale under Section 11-721 of the D.C. Code diverted attention away from that crucial issue which Petitioner thought that court, en banc, would want to reconsider to prevent manifest injustice. See Abrams v. Abrams, 254 A.2d 843, D.C. App. (1968); and Fehr v. McHugh, 413 A.2d 1285, D.C. App. (1980) wherein it is said in headnote 7:

> Judgment 815.
>
> Holding that mere existence of pending appeal does not deprive final order of requisite degree of finality entitling it to recognition under full faith and credit clause is restricted to cover only those types of cases in which party is attempting to enforce money judgment from foreign jurisdiction.

Petitioner submits that a supersedeas bond was unnecessary in the perfection of his appeals.

Conceding, arguendo, that an adjudication was made in No. 7831 re the confirmation order, per se; and, that an adjudication was made in re the final order closing the ancillary administration, when the D.C. Court of Appeals in No. 9672 found "no error of law requiring reversal;" we are left with the order of dismissal in No. 8406, the appeal from the Superior Court order Authorizing and Directing the Execution of the Deed. Certainly, Res Judicata is inapplicable to that proceeding.

In Davis v. Young, 412 A.2d 1194 (1980), the D.C. Court of Appeals tells us:

> Traditionally the doctrine of Res Judicata or its subpart collateral estoppel[18] was not applicable

[18]See generally, Henderson v. Snider Bros., Inc., D.C. App. 409 A.2d 1083 (1979).

> to determinations by administrative agencies. However, the modern trend is to hold the doctrine applicable when '[the] agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an *adequate* opportunity to litigate.' (Citations omitted.) *The threshold inquiry is whether the earlier proceeding is the essential equivalent of a judicial proceeding.* (Emphasis added)

The 8406 dismissal followed close on the heels of the November 13, 1974 decision No. 7831, coming on December 20, 1974, even though plaintiff asked for more time to file a brief. No hearing was scheduled or held. The proceeding simply came to an abrupt, arbitrary star chamber style end with no further notice to the petitioner, and, therefore, it is respectfully submitted that that earlier proceeding was not essentially the equivalent of a judicial proceeding. In Feldman v. Gardner, our D. C. U. S. Court of Appeals said:

"B. The Characteristics of Judicial Proceedings

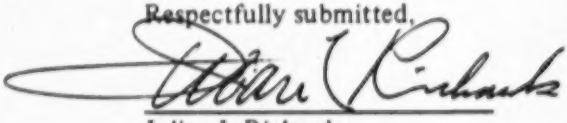
Not every effort pursued in court is judicial in quality. Many years ago in Prentis v. Atlantic Coast Line Co. the Supreme Court emphasized that a determination of whether a tribunal has acted in a judicial capacity turns on the character of the proceeding and the nature of its outcome, rather than on the circumstance that the decisionmaking body was "at another moment, or in its principal or dominant aspect, . . . a court . . ."

CONCLUSION

Administrator Hamilton disregarded Section 20-1106, D.C. Code 73 Ed., making no "proper showing . . . that the personal estate of a decedent is insufficient . . . (See Vogel v. Saunders, 92 F.2d, 984, 68 App. D.C. 31 (1937) D.C. Circuit), therefore, no divestiture was accomplished and the deed being complained of is void.

In the Edith A. Parsons estate administrations and the suits which arose from it, the non-judicial character of the actions of the courts and fiduciaries in all the lower court proceedings violated petitioner's right to due process of law. His privileges and immunities under the Fourteenth Amendment as an estate Executor-Designate, Estate-Executor and heir and residuary legatee were rendered virtually meaningless and his Fifth Amendment right to have his title unclouded and his right that any deed affecting his rights be executed as a judicial act with the solemnities and requisites required by this honorable court in Clark v. Graham, 6 Wheat 577, 5 L. Ed. 334 were denied him. Those rights called for by Clark v. Graham require, petitioner respectfully submits, that a deed under the circumstances in the case be executed by the freely rendered signatures of the title holders before a duly licensed witness perceiving the willingness and competency of the signators to affix their executing, consummating marks. The mistakes made call upon this honorable court to overrule or set aside with remand the lower courts imposition of Res Judicata.

Respectfully submitted,



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(Please refer to the Argument and Conclusion in companion petition A-159, for Writ of Certiorari to District of Columbia Court of Appeals which supplements A-158.)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 82-2317 SEPTEMBER TERM, 1982

JULIAN I. RICHARDS,
Appellant,

[FILED: 3/28/83]

v.

PATRICIA HAMILTON, ET AL.,

BEFORE: Tamm, Ginsburg and Bork, Circuit Judges

O R D E R

Upon consideration of appellant's motion for stay, appellees' motions for summary affirmance or dismissal, appellant's brief, and the record on appeal herein, it is

ORDERED by the Court that the motions for summary affirmance are granted and appellant's motion for stay is dismissed as moot.

A memorandum of the Court is attached.

It is FURTHER ORDERED by the Court, *sua sponte*, that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended June 15, 1982.

Per Curiam

Circuit Judge Bork did not participate in the foregoing order.

NO. 82-2317 MEMORANDUM

Appellant has litigated his claim in the District of Columbia Superior Court, the District of Columbia Court of Appeals, and the Supreme Court of the United States. Under the doc-

trine of res judicata (claim preclusion), appellant is now barred from reasserting the same claim in a subsequent suit. *See Semler v. Psychiatric Institute of Washington, D.C.*, 575 F.2d 922, 927 (D.C. Cir. 1978). Principles of res judicata prevent relitigation not only on the grounds or theories actually advanced, but also on those which could have been advanced in the prior litigation." *Mervin v. FTC*, 591 F.2d 821, 830 (D.C. Cir. 1978) (per curiam). Thus, the district court properly dismissed appellant's complaint on res judicata grounds.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIAN I. RICHARDS,
Plaintiff,

v. Civil Action No.: 82-1854

PATRICIA HAMILTON, et al., [FILED: 10/27/82]
Defendant.

MEMORANDUM OPINION

This action is before the Court on defendants' motions to dismiss. Plaintiff challenges the authority of an estate administrator to sell an apartment building located in the District of Columbia in which he asserts a one-sixth interest. He has sued the personal representative of the estate administrator, Patricia Hamilton, and the buyer and current owner of the property, Howard University.

Plaintiff admits to notice in March 1974 of the Administrator's petition for authority to convey the property. Complaint Section 10. He did not oppose the disposition of the property before the Superior Court of the District of Columbia, Probate Division. That court entered an order on May 7, 1974 approving the conveyance.

Plaintiff's appeal to the Court of Appeals for the District of Columbia was dismissed, *In re Parsons*, 328 A.2d 383 (D. C. 1974), and rehearing denied. Attachment "A" to defendant Howard University's motion to dismiss. Plaintiff's further appeal of that case to the United States Supreme Court was dismissed. Attachment "C" to defendant Howard University's motion to dismiss.

Eight years after judicial authorization for sale of the apartment building, without alleging any new facts since the dismissal of his appeals, plaintiff filed this diversity action in federal court.

Under the doctrine of *res judicata*, "once a claim or cause of action has been presented for adjudication and a valid and final judgment on the merits has been rendered, the same claim or cause of action cannot be asserted in a subsequent suit." *Semler v. Psychiatric Institute of Washington, D.C.*, 575 F.2d 922, 927 (D. C. Cir. 1978). Principles of *res judicata* prevent relitigation not only on the theories actually advanced, but also on those which could have been advanced in the prior litigation. *Mervin v. Federal Trade Commission*, 591 F.2d 821, 830 (D. C. Cir. 1978).

In this action, plaintiff alleges that the estate administrator lacked authority to sell the apartment building. An examination of *In re Parsons*, 328 A.2d 383 (D. C. 1974), reveals that plaintiff's original appeal in 1973 from the order permitting the sale was dismissed for lack of prosecution. *Id.* 384. He raised the claim of lack of authority in a fresh appeal from a subsequent order in 1974. *Id.* 384-85. That appeal was dismissed in *In re Parsons* on grounds of *res judicata*.

This action must be dismissed for the same reason. As the District of Columbia Court of Appeals stated in *Thornton v. Little Sisters of the Poor*, 380 A.2d 593, 595 (D. C. 1977), "There must at some time come an end to litigation, not only for the sake of the adverse party who should not be vexed again with the same cause, but also in the interest of the state in settled law and legal relations, and the interest of the court and litigants in an orderly judicial process (citations omitted)."

Plaintiff litigated his case to the highest court of the District of Columbia and to the highest court in the land over seven years ago. He is bound by the determinations of those courts on his prior appeals. *United States v. Epstein*, 608 F.2d 1 (D. C. Cir. 1979). To allow him to relitigate the same issues in this action, especially where no serious questions of federal law are implicated, would offend strong public policy and common law doctrine that favor putting an end to stale litigation. The

Court need not reach the defendants' argument that this action is also barred by the statute of limitations, D. C. Code Section 12-301, and laches.

Defendants' motions are granted, plaintiff's motion for a stay is denied, and this action is dismissed with prejudice.

An appropriate order accompanies this opinion.

/s/
JUNE L. GREEN
U. S. DISTRICT JUDGE

October 26, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIAN I. RICHARDS,
Plaintiff,

v. Civil Action No.: 82-1854

PATRICIA HAMILTON, ET AL.,
Defendant.

O R D E R

Upon consideration of defendants' motions to dismiss, plaintiff's opposition and motion for a stay, and the entire record in this action, for the reasons expressed in the accompanying memorandum opinion, it is by the Court this 26th day of October, 1982,

ORDERED that defendants' motions to dismiss are granted; it is further

ORDERED that plaintiff's motion for a stay is denied; and it is further

ORDERED that this action is dismissed with prejudice.

/s/
JUNE L. GREEN
U. S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 82-2317 SEPTEMBER TERM, 1982

JULIAN I. RICHARDS,

Appellant,

v. Civil Action No. 82-01854

PATRICIA HAMILTON, ET AL.,

[FILED: 6/9/83]

Appellees.

BEFORE: Tamm, Ginsburg and Bork, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Appellant, filed May 12, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

FOR THE COURT:

George A. Fisher, Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Bork did not participate in this Order.